IN THE LAND CLAIMS COURT OF SOUTH AFRICA

HELD AT DURBAN

(1) REPORTABLE: YES / ~~NO~~
(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~
(3) REVISED.

4/12/18

Before: **Bertelsmann J & Assessor Sibeko**

CASE NO: 03/2014

In the matter between:

THE QWABE/WATERFALL COMMUNITY	Plaintiff/Claimant
and	
THE MINISTER OF RURAL DEVELOPMENT AND LAND AFFAIRS	1st Defendant
THE REGIONAL LAND CLAIMS COMMISSIONER OF KWA-ZULU NATAL	2nd Defendant
THE MAIDSTONE PLANTERS PRO-ACTIVE LANDOWNERS ASSOCIATION	3rd Defendant
TONGAAT HULETT LIMITED	4th Defendant

JUDGMENT

BERTELSMANN J

[1] This matter has been afflicted by most, if not all, the ills that have befallen the restoration of land processes created by the Restitution of Land Rights Act 22 of 1994. ("the Act"). What was conceptualised as a realisation of the constitutionally enshrined aim to restore the land that was alienated from their original owners or occupiers by racial legislation and practices, has turned into the creation of cottage industries for legal practitioners, some allegedly corrupt activities by landowners, officials and claimants and has degenerated into long, costly, cumbersome and divisive legal processes and proceedings that are more often than not driven by political or other selfish motives and end in frustration and disappointment.

[2] This case is an example of the worst malpractices that have beset and endlessly delayed what was supposed to be a restorative process ameliorating the damage caused by past injustices and thereby contributing to the process of creating a nation built on the principles of dignity, equality and freedom.

THE PARTIES

[3] The Plaintiffs or Claimants are described as the Qwabe or Qwabe/Waterfall Community ("the Claimant Community"), represented by Mr Phillip Gumede and/or the Trustees of the Makhosikhosi Trust ("the Trust"), established in terms of the Trust

Property Control Act 67 of 1988. The Claimant Community is alleged to consist of individuals that form a community as defined in the Act[1]. The exact number of individual members making up the community is in dispute, as is the existence of such group at any stage relevant to these proceedings. The Trust was placed under curatorship soon after the trial started and was represented by a *curator ad litem* for the better part of the trial proceedings

[4] The First Defendant is the Minister of Rural Development and Land Reform who is cited in these proceedings in his official capacity of care of the State Attorney, 8th Floor, Old Mutual Centre, 167 Street, Pretoria, Gauteng Province. He is the responsible Minister as defined in the Act.

[5] The Second Defendant is the Regional Land Claims Commissioner for KwaZulu-Natal whose official address is Second Floor, African Life Building, 200 Church St, Pietermaritzburg, KwaZulu-Natal Province. The Second Defendant is the functionary appointed by the Commission on Restitution of Land Rights ("the Commission"); established in terms of section 4 of the Act to fulfil the delegated functions of the National Land Claims Commissioner in the province of KwaZulu-Natal. The Second Defendant is also cited as Head of the Commission's Regional Office in Kwazulu-Natal.

[6] The Third Defendant is the Maidstone Planters Pro-Active Landowners Association ("MPPLA"). The Third Defendant was formed by property owners, all of whom were and are affected by the claim that is the subject matter of this litigation. The identity of

[1] ""**Community**" means any group of persons whose rights in land are derived from shared rules determining access to land held in common by such group, and includes any part of such group'

the twenty-six members of the third defendant is not in dispute and they need not be individually referred to. It is also unnecessary to list each property included in the claim with reference to the registered owner. The Third Defendant represents the vast majority of affected owners. Only the Fourth Defendant entered the lists in its individual capacity as an owner. Some owners did not oppose the claim, others (including at least one member of the Third Defendant) came to some arrangement with the Claimants and the First and Second Defendants during the long drawn out proceedings. The details of these arrangements are of no consequence to the outcome of this claim.

[7] The Fourth Defendant is Tongaat Hulett Ltd. The Fourth Defendant is the owner of the immovable property known as Remaining Extent of the Farm Pencarrow 12860, previously known as Portion 115 of the farm Compensation.

HISTORICAL AND CHRONOLOGICAL INTRODUCTION

[8] The claim was lodged on 2 May 1996 by Mr Philip Gumede on behalf of the Qwabe Land Claims Committee with the Regional Land Claims Commissioner, the Second Defendant. The formal validity of the claim form completed by Mr Gumede as well as his mandate to do so were challenged by the Third and Fourth Defendants, a challenge which was abandoned during argument on day one of the trial. The claim form completed by him is nonetheless significant because of its wording. In the paragraph calling for a motivation of the claim the following is said:

'We need our land back. However, this does not mean that we need the whole land that belonged to us, but we need a share as we would like to use that land for same purpose that it is being used for now.'

[9] In the paragraph calling for any further information the claimant would like to bring to the Commission's attention it was added:

'We are not saying all the land be given back to us, but we need to have a share in the are(a) so as to plant sugar cane as they do currently - also for other things they use the land for. (Thus) We need a share!!!'

[10] The following farms were claimed in an annexure to the claim form:

10.1 Compensation 868

10.2 Driefontein 127

10.3 Kruisfontein 963

10.4 Spion Kop (sic) 1125

10.5 Spitzkop 1398

10.6 Constance 15191

10.7 Waterfall 1205 (Portion under Woodlands)

10.8 Vaalhoek 1231 (Mvuma)

10.9 Erradale 391 (owner – Collins)

10.10 Preen 14325 (Osizweni Mission)

10.11 Sinember Peak 6354

10.12 Windlands 16070

10.13 Moratury 15298

10.14 Waagendrift 1559

10.15 Lot 61 521 Flagstaff (farm) 69912 estate

10.16 Lot 1524 (Clemont Foxhill)

10.12 Sheffield Beach Lot 611521.

10.18 Tara Estate Lot (indecipherable).

It must however be underlined that the original claim form prepared by Mr Phillip Gumede on a Sanlam letterhead referred to two immovable properties only, namely Waterfall 1205 (Portion under Woodlands) and Vaalhoek 1231. In later pleadings the "Portion under Woodlands" was alleged to consist of

Remainder of Portion 2 of the farm Waterfall No. 1205;

Portion 20 of Portion 3 of the Farm Waterfall 1205;

Portion 21 of the farm Waterfall 1205

Portion14 of the farm Waterfall No 1205

Remainder of Portion 10 of the farm Waterfall No 1205;

while the reference to the farm Vaalhoek was qualified by reference to the Mvuma portion which was described as consisting of

Remainder of the farm Vaalhoek 1231;

Portion 10 of the farm Vaalhoek 1231;

Portion 11 of the farm Vaallhoek 1231.

[11] The Second Defendant prepared an interim report in terms of Rule 3 of the Rules Regarding Procedure of the Commission on Restitution of Land Rights. A copy of this interim report is annexed to the investigation report of the Second Defendant which was prepared after the claim was lodged and accepted as a valid claim. This document is marked "Referral and Responses". The following is said under the heading:

"**ISSUES RAISED BY THE CLAIMS**":

> "In the meeting Mr Alois Gumede of the Qwabe Tribe indicated that they have lodged claims for various farms in the Lower Tugela. The farms are claimed because they form the traditional boundaries and jurisdiction of the Qwabe Tribe. He indicated that the community was not moved from each and every farm that is claimed some of the farms were listed to indicate and emphasize that the properties are within the Qwabe traditional boundaries."

This statement casts immediate doubt upon the claim's validity and upon the manner in which the Second Defendant approached his task to establish the same. Land that was never occupied or the scene of a forced removal cannot be the object of a restitution claim.

[12] On 10 November 2006 the Second Defendant caused notice 1536 of 2006 to be published in the Government Gazette number 29362 in terms of Section 11 (1) of the Act that a restitution of land rights claim affecting the land that is in issue in this matter

had been lodged with his office. The properties that were identified in this notice included the following portions:

The farm Vaal Hoek number 1231:

12.1 Remainder of the farm;

12.2 Remainder of Portion 1;

12.3 Portion 2;

12.4 Remainder of Portion 7;

12.5 Remainder of Portion 8;

12.6 Portion 9;

12.7 Portion 10;

12.8 Portion 11;

12.9 Portion 12;

12.10 Remainder of Portion 13;

12.11 Portion 14;

12.12 Portion 15;

12.13 Portion 16;

12.14 Portion 12;

The farm Waterfall No 1205:

12.16 Portion 2;

12.12 Remainder of Portion 3;

12.18 Portion 5;

12.19 Portion 7;

12.20 Portion 8;

12.21 Remainder of Portion 9;

12.22 Remainder of Portion 10;

12.23 Remainder of Portion 12;

12.24 Portion 14;

12.25 Portion 20;

12.26 Portion 21;

12.27 Portion 23;

<u>The farm Umhlali No 1126</u>

12.28 Portion 1;

12.29 Portion 7;

12.30 Portion 9;

12.31 Remainder of Portion 10;

12.32 A portion of the consolidated Portion 24 known before the consolidation as Portion 12;

12.33 Remainder of Portion 19;

12.34 Remainder of Portion 21;

12.35 Portions 22, 31, 32, 33, 34, 35, and 40;

12.36 Remainder of Portion 43;

12.37 Portions 45, 51 and 52.

The farm Hopewell

12.38 Portions 1, 5, 6, 7, 8 and Remainder of Portion 9;

12.39 Remainder of Portion 10;

12.31 Portion 12;

The farm Compensation 686

12.32 Portion 2;

12.33 Remainder of Portion 5;

12.34 Remainder of Portion 8;

12.35 Portion 7;

12.36 Remainder of Portion 6;

12.37 Portions 41,57, 62, 77 and155 of Portion 115;

12.38 Portion 160 of Portion 1;

12.39 Portion 161,

12.40 Portion 162 of Portion 6; and

12.41 Portion 164;

12.42 A portion of the consolidated Remainder of Farm No 12800, known before consolidation as Portion 115 of the farm Compensation;

The farm De Jagers Kraal

12.43 Portions 4, 19, 20, 33, 34, 37, 40, 51, 52, 53, 55, 56, 58 and 86;;

12.44 Remainder of De Jagers Kraal;

12.45 Remainder of Portion 7 now part of Shakaskraal Township;

12.46 Remainder of Portion 32;

12.47 A portion of the consolidated Portion 86, previously known as a portion of the consolidated Portion 83 and known before consolidation as the Remainder of Portion 42;

12.48 A portion of the consolidated Portion 86 known before consolidation as Portion 54;

12.49 A portion of the consolidated Portion 85 as portion of the consolidated Portion 83 known before consolidation as Portion 60;

12.50 Remainder of Portion 63.

The farm Spitzkop

12.51 Portions 9, 10, 11, 14, 15, 18, 20, 21, 22, 32, 33, 34, 35 36, 39, 40 and 42;

12.52 Remainder of Portion 5;

12.53 Remainder of Portion 8;

12.54 Remainder of Portion 12;

12.55 Remainder of 13;

12.56 Remainder of Portion 22;

12.57 Portions 32, 33 and 34 of Portion 26;

12.58 Remainder of Portion 48;

12.59 Remainder of Portion 47.

The farm Kruisfontein

12.60 Portions 11, 12, 15, 16, 19, 20, 21, 23, 24, 27, 29, 31, 32, 34, 36, 37, 38, 39, 40, 41, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 58, 59, 60, 61, 62, 63, 64, 65, 67, 80, 81, 82, 83, 84, 85, 88 and 87;

12.61 Remainder of Portion 6;

12.62 Remainder of Portion 7;

12.63 Remainder of Portion 8;

12.64 Remainder of Portion 12;

12.65 Remainder of Portion 18;

12.66 Remainder of Portion 22 of Portion 12; of the same farm;

12.67 Remainder of Portion 25;

12.68 Remainder of Portion 26;

12.69 Remainder of Portion 29;

12.70 Remainder of Portion 33;

12.71 Remainder of Portion 35;

12.72 Remainder of Portion 42;

12.73 Portion 57 of Portion 22;

12.74 Portion 89 of Portion 42;

12.75 Portion 90 of Portion 42;

12.76 Portion 91 of Portion 42.

12.77 The farm Hillbrow 12460.

12.78 Remainder of the farm Constance 15191.

[13] Due notice was given to the owners of the properties affected by the claim and they were consequently subject to the restrictions imposed by section 11(7) (aA)[2] of the Act, effectively denying them the right to deal with their property --- other than to continue existing activities - without prior notice to the Second Defendant. It goes

[2] Section 11(7) (aA) of the Act reads:
'no person may sell, exchange, donate, lease, subdivide, rezone or develop the land in question without having given the regional land claims commissioner one month's written notice of his or her intention to do so,...'

without saying that the mere publication of the notice in the Government Gazette had the well-known detrimental effect that such publication has on any property affected thereby. The court is entitled to take judicial notice of the fact that a property subject to a restoration claim suffers an immediate diminution in its market value and is very difficult to dispose of or to encumber. The Claimants and the First and Second Defendants were indubitably also aware thereof.

[14] The gazetted claim covers more farms than were listed in the claim form. If regard were to be had to the original description of the claim on the Sanlam letterhead the major part of the claim would fall away immediately. No part of the farm De Jagers Kraal had been claimed and it was therefore gazetted incorrectly. The same applies to a number of the other portions referred to in the gazetted claim, notably the portions of Waterfall and Vaalhoek, of which only the portions known as Woodlands and Mvuma respectively were referred to in the claim form. Further reference will be made to this aspect later. It should be recorded at this juncture already, however, that the Claimant Community (and the First and Second Defendants) ultimately failed to produce any evidence at all of any dispossession (or prior occupation) by the forebears of members of the Claimant Community in respect of the following portions of the undermentioned farms:

1. **Compensation**

    a.) The properties of Moodley Sugars (Portions 2 and 7of Compensation;

    b.) The property of the Fourth Defendant, Tongaat Hulett Ltd, namely Remaining Extent of Pengarrow 12860;

c.) The property of Nicholas Jordan (formerly Portion 162 of Compensation);

d.) The property of RJ Mattison (Portion 164, a Portion of Portion 6) of Compensation;

e.) The property of DMA Hamlyn (Portion 4, a Portion of Portion 5 of Compensation.

2. **Spitzkop**

a.) Portion 40 of Spitzkop;

b.) Portion 49 of Spitzkop;

c.) Portion 36 of Spitzkop (Bon Espoir);

d.) Portion 48 Spitzkop (Terracine).

3. **Kruisfontein**

Portion 83 Kruisfontein.

[15] The Parties were agreed that the said properties could not be acquired by the Claimant Community absent any evidence to substantiate a claim thereto and that the relief sought in respect of these properties must be dismissed.

[16] The members of the Third Defendant attempted to negotiate with the Second Defendant within weeks of the publication of the Notice. They sought a resolution of the claim through the potential identification of some of the claimed land that might be

sold to the State in settlement of an otherwise disputed claim. The Second Defendant was not prepared to settle on any basis other than the transfer of all the claimed properties to the Claimant Community. Negotiations continued nonetheless, driven by the Third Defendant and its attorney of record, Mr Clive Kelly. Eventually it appeared that a resolution might be on the cards and a settlement agreement was drafted in 2009 during and after protracted discussions with the Claimant Community, the trustees of the Makhosikhosi Trust and the representatives of the Third Defendant. The settlement agreement envisaged the transfer of several properties to the Claimant Community in addition to a number of farms that had been transferred to the Trust already once the claim had been published.

[17] The total area of the properties belonging to several members of the Third Defendant that were to be transferred in terms of the proposed settlement agreement to the State for the benefit of the Trust, amounts to almost 797 ha. The landowners signed sale agreements to effect the transfer of these properties, but the First Defendant has to date, some nine years or more later, failed to effect transfer of the land or to make payment of the agreed purchase price to the landowners concerned.

[18] The properties that were acquired in favour of the Makhosikhosi Trust soon after the claim had been gazetted and before the present processes were initiated cover an area of 3460, 7737 ha. In the light thereof the landowners contended in their response to the referral in the alternative that the Claimants had in any event been sufficiently compensated even if any part of their disputed claim were to be upheld.

[19] As a result of the inaction on the part of the First and Second Defendants the proposed settlement agreement came to nought. No further progress was made with

the advancement of the claim, in spite of numerous representations by the Third Defendant, until the latter resolved to make formal representations to the Second Defendant in terms of section 11A[3] of the Act to persuade the Second Defendant to withdraw the claim. A comprehensive motivating memorandum was delivered to the Second Defendant during August 2011 by the sheriff.

[20] In this memorandum the Third Defendant relied upon the research conducted in respect of the claim on behalf of the members of the Third Defendant by a historian, Mr Albert van Jaarsveld, whose report was compiled over a period of several months. This report concluded that:

20.1. The farm Compensation has been held in private ownership by white owners since 1849, when it was granted to a Mr Morewood and later acquired by the Hulett family, and has been actively occupied, developed and farmed by its owners to the present day;

20.2. The first whites settled in what is now KwaZulu-Natal in 1837, when the area south of the Tugela River was depopulated as a result of raids conducted by the Zulu kings Shaka and Dingaan;

20.3. The Qwabe Tribe only began to move from Zululand to what became the Umvoti Reserve during the 1840s and stayed there until 1898. This Reserve is situated a significant distance from the claimed land;

[3] Section 11A (1) reads: 'Any person affected by the publication of the notice of a claim in terms of wection 11(1) may make representations to the regional land claims commissioner having jurisdiction for the withdrawal or amendment of that notice'

20.4. In 1898 the Qwabe Tribe split after bloody faction fights into the eNkwewnkwezi section and the eNthandeni section. The latter remained in the Reserve whereas the former resolved to leave their former home. This move of necessity entailed an abandonment of the area that had been allocated officially in 1849 for settlement of the Tribe and an acceptance of the fact that the eNKwenkwezi section had to move on to privately owned land. This land was occupied by individual white farmers and the Natal Land and Colonization Company ("NLCC"). Those who moved onto these properties became rental paying tenants who had to pay between £1 and 3 per hut per annum to the owner;

20.5. The forebears of the Claimant Community moved onto this land that belonged to private individuals or the NLCC. The NLCC sold many of its extended properties to white individuals in the first half of the 20th century. At no stage did the forebears of the present Claimants own or occupy any of the farms subject to the claim prior to 1898 and consequently there was no evidence of any historical or traditional title by any individual or community to the land settled by the white farmers;

20.6. Even the leaders of the forebears of the Claimant Community, including Chief Siziba, were rental tenants – Chief Siziba was called a 'landless king' as a result of this fact - and were subjected to eviction for non-payment of rental until 1940, when the then South African Native Trust bought subdivision K of the farm Waterfall, in extent 919 ha, where Chief

Siziba and a number of his followers were settled. Many of his followers did not move to subdivision K but remained as rental paying tenants on the farms, including farms subject to the claim;

20.7. Evictions of African labourers from the white owned farms did occur but were invariably effected because of non-payment of rental. There was – and is - no evidence of any evictions that were carried out by virtue of racially discriminatory laws or practices either before or after 1913;

20.8. Those members of the eNkwenkwezi section that remained loyal to their leader moved on to white owned farms, including the farms under claim, and obtained occupation on the farms by entering into individual employment agreements with the owner, or by entering into tenancy agreements which required the payment of rental in return for the occupation of a part of the owner's property. The terms of their occupation of a portion of the farmer's property were determined by the employer in the case of labourers, and the owner if they became rental tenants. They did therefore not form part of a group of persons "*whose rights in land are derived from shared rules defining access to land held in common by such group*" as defined by the Act. They were at no stage in control of the claimed land; neither individually nor collectively.

[21] The memorandum in support of the request to withdraw the claim concluded with a reference to the inordinate delay that occurred between the lodging of the claim in 1996, the publication thereof in 2006, the repeated efforts by the Third Defendant to negotiate an agreed resolution of the claim, the preparation of a proposed settlement

agreement in 2009 and the failure of the Second Defendant to take any further action thereafter, and contended that the delay was unconstitutional and infringed the fundamental rights of the Third Defendant's members.

[22] Reference was also made to the fact that more properties were included in the published claim then those listed in the claim form, with particular reference to the farms Compensation, Vaalhoek and Waterfall. The Second Defendant's attention was also drawn to the fact that the Third Defendant had obtained another historian/anthropologist's report, that of Dr Debbie Whelan, whose research of the history of the occupation of the farm Compensation had come to the same conclusion as Dr Van Jaarsveld, that there was no evidence of a community as defined by the Act having resided on the claimed land prior to its transfer to individual owners.

[23] The final submission was made that the Claimant Community, if it indeed had a valid claim, had already been compensated by the transfer of land to it, or to the Trust, and that any further transfer of any claimed property would amount to overcompensation. The Second Defendant was earnestly requested to withdraw the claim.

[24] The representations made on behalf of the Third Defendant were not acted upon by either the project manager, Mr Protas Zuma or the Second Defendant, Mr Singh, with the result that the Third Defendant decided to demand the reference of the claim by way of a mandamus application to this Court in terms of section 14 of the Act. Such demand was made in writing and served by sheriff on the Second Defendant on 23 October 2011. The application demanding a referral to this Court was dated 30 November 2011. On 23 December 2011 the First and Second Defendants gave notice

that they intended to participate in the application. On 14 February 2012 the Third Defendant demanded of the First and Second Defendants to deliver their answering affidavits within 15 days of such demand. When no response was forthcoming the Third Defendant delivered a notice in terms of Rule 32 (1) demanding the delivery of the First and Second Defendants' affidavits within five days of date of the notice or be barred from further participation in the application.

[25] The matter was set down for 20 April 2012 but was removed on 2 April 2012 from the roll. Negotiations between the parties followed during which the Second Defendant intimated that he had come to the conclusion that the claim was invalid. A consent order was consequently granted on 26 September 2012 by this Court at the request of the parties in terms of which the Second Defendant was ordered to publish a notice of his intention to withdraw the publication of the claim as provided for in section 11A(2) of the Act and after the expiry of 30 days, publish a notice of the withdrawal of the claim. Only if good cause was shown to the Second Defendant's satisfaction that the claim should not be withdrawn should the Second Defendant then, after having provided the Third Defendant immediately with a copy of any document showing such good cause not to withdraw the claim, take the appropriate steps to refer the matter to this Court for trial.

[26] The Second Defendant failed to comply with the order and delayed the publication of the notice of intention to withdraw the claim. Only after three months had expired and after repeated demand by the Third Defendant was the notice published.

[27] The Claimant Community did in fact object to the intended withdrawal of the claim by an emotional letter in which it was asserted that its forebears had been forcibly

removed as a result of racially oppressive practices from a much larger area than was covered by the claim. The Second Defendant failed to provide the Third Defendant immediately with a copy of such letter and failed to take further steps which resulted in a contempt application being launched on 12 March 2013 to compel compliance with the consent order. The application was opposed and eventually led to a further order dated 9 July 2013, in which the Second Defendant was ordered to provide reasons for his conclusion that the Claimant Community's objections to the proposed withdrawal of the claim notice were sufficiently cogent to alter his view; and to provide reasons why he was satisfied that the claim complied with the conditions laid down by the Act for the acceptance and gazetting of the claim. The Second Defendant was furthermore ordered to certify within 30 days from date of the order that the claim should be referred for trial.

[28] The Third Defendant sought another contempt order against the Second Defendant based upon the Second Defendant's failure to comply with the later order, in respect of which a trial date was requested during April 2014. No date had apparently been allocated when the matter was referred for trial.

[29] It was only on 18 July 2014 that the matter was allocated to this Court.

[30] It must be underlined at this juncture that the Second Defendant provided no indication whatever after receipt of the Third Defendant's memorandum that he had taken note of the contents thereof, considered the summary of the expert evidence that it contained or had re-examined the published claim in the light thereof. The First and Second Defendants have met this criticism by reference to the established principle that it is not the Commission's function to adjudicate upon the merits of a

claim; see *Mahlangu N.O. v Minister of Land Affairs* 2005 (1) SA 451 (SCA) at paragraph 13; *Farjas v Regional Land Claims Commissioner, KwaZulu-Natal* 1998 (2) SA 900 (LCC). While it is correct that the Commissioner need only establish that a claim for restitution of land has been lodged in the prescribed manner, complies with the provisions of section 2 of the Act, and is not vexatious or frivolous, (a threshold that may be even lower than "*an arguable case*," as Nugent JA suggested in the *Mahlangu* matter,), the test set by section 11 A (2) is higher: The Regional Land Claims Commissioner must have "*reason to believe that any of the criteria set out in paragraphs (a), (b) and (c) of section 11 (1) have not been met…* ". Reason to believe can only be induced by evidence of some persuasiveness, particularly when the reconsideration of the claim is initiated by an objection presented to the Second Defendant in terms of section 11 A (1) of the Act, as is the case here.

[31] In the further particulars filed by the First and Second Defendants in answer to a request by the Third and Fourth Defendants after the matter had been referred, the Second Defendant stated through his attorney of record that he had thought that the Claimant Community had been sufficiently compensated by the earlier transfer of the roughly 3500 ha of land referred to above when he decided to file the notice of intended withdrawal. He was persuaded to the contrary, it was stated in the further particulars, when the letter of objection by the Claimant Community asserted that they had been deprived of more than 12,000 ha. It is unnecessary for purposes of this judgement to decide whether the emotional argument advanced in the letter of objection justified the withdrawal of the notice in terms of section 11 A (2), but the failure to deal with the objections raised by the Third Defendant remains a matter for comment.

[32] In the referral report annexed to the Notice of Referral in terms of section 14 (1) of the Act the following aspects are stated as facts upon the strength of which the Claimant Community was said to be entitled to restoration (the allegations are couched in terms that have acquired the nature of a refrain or shibboleth repeated almost verbatim in most referral reports the Court has seen over the years):

32.1. The Claimant Community had beneficial occupation under their chiefs of the claimed land upon which they resided by virtue of their historical right of occupation;

32.2. The land was at least partially transferred into white ownership prior to 1913, but notwithstanding such transfer of ownership the Claimant Community continued to occupy the land;

32.3. Such land was occupied by the Claimant Community as either occupants and/or tenants and/or labour tenants;

32.4. As occupants and or tenants and/or labour tenants the Claimant Community held their residuary rights in the land in common;

32.5. In such capacity or capacities the Claimant Community derived their rights in the land from shared rules determining access to the land and did so until they were dispossessed of the land;

32.6. They practised subsistence farming on the claimed land;

32.7. Their rights were rights in land as defined in section 1 of the Act;

32.8. The dispossession of the rights in land took place over time and in particular as the sugar growing industry grew, forcing the community off the land;

32.9. The process of dispossession was facilitated by the repressive laws passed by the then authorities in furtherance of the policy of racial discrimination. These laws included the Master and Servants Law (Transvaal and Natal) Amendment Act 26 of 1926; the Native Land Act 27 of 1913; the Native Service Contract Act 24 of 1932 and the Group Areas Acts of 1950, 1957 and 1966; the Native Areas Act Proclamations under section 25 of Act 38 of 1927 and the Stock Limitation Proclamation No. 161 of 1938. These laws enabled the sugarcane farmers to exercise control over members of the Claimant Community and to reduce them to the status of labour tenants;

32.10. The dispossession of the Claimant Community occurred between 1918 and the late 1950s;

32.11. The Claimant Community did not receive compensation for their dispossession;

32.12. The Claimant Community enjoyed unregistered rights in land, customary law interest, the interests of labour tenants and beneficial occupation for a continued period of not less than 10 years prior to the dispossession;

32.13. Because of the foregoing considerations the Claimant Community was entitled to restoration of the land claimed, and their rights in any land restored should be upgraded to full ownership.

32.14. In annexures to the referral report reference is made to the eradication and removal of so-called "Black Spots", but a letter by the Bantu Affairs Commissioner at Stanger, dated 20 September 1971 and addressed to the Chief Bantu Affairs Commissioner, Durban, asserts that the only "Black Spot" in the district where illegal squatting was taking place was the Umvoti Mission Reserve at Groutville.

THE RACIAL LEGISLATION AND LABOUR TENANCY RELIED UPON.

[33] In the referral report mention is made of a range of repressive and racist legislation, such as the Group Areas Acts, that were allegedly employed by the government in the apartheid era or by the landowners to repress and dispossess the members of the Claimant Community. The listing of the racist laws quoted above has also become a refrain, almost a shibboleth, that is recited almost verbatim in virtually every validation and referral report that this Court has seen over the past four or five years.

[34] It must be underlined that throughout the almost two years that the trial ran not a single reference was made to any legislation that had in fact been applied to evict any member of the Claimant Community or his or her forebears from any of the claimed land; let alone proof of any dispossession by the application of any of the repressive laws. The evictions that were proven were effected through the land owners' exercise

of the rights arising from rental agreements and labour contracts. By the same token there was no evidence at all of any member of the community's forebears ever having been a labour tenant,

THE PLEADINGS

[35] In their responses to the referral report the parties maintained and repeated the assertions that had been put forward in their respective pre-trial submissions.

[36] The landowners requested comprehensive further particulars regarding the community that allegedly occupied the claimed farms, and in particular sought information concerning the locality of the homesteads allegedly occupied by the members of the Claimant Community prior to their alleged dispossession. The Claimants experienced significant challenges in providing this information. The original request was directed in 2015. It was responded to out of time and during a pre-trial conference on 3 May 2016 the landowner defendants complained about the unsatisfactory nature thereof. Many questions were answered with a reference to the pending expert report by Dr Fischer, who had been commissioned by the Claimants to assist them.

The assertion that the expert would provide answers to factual questions relating to the composition of the Claimant Community and the identification of the physical location of homesteads that had allegedly been occupied by members of the Community or its forebears was unusual. This information could reasonably be expected to be readily available in a community of which some members claimed to have been in occupation of the claimed land prior to the alleged dispossession.

[37] The Claimants struggled to supply the answers sought by the landowners. Repeated attempts were made to provide information the Third and Fourth Defendants could engage with. At numerous pre-trial conferences the Claimants were reminded of their failure to comply with their duty to inform the landowners of the case they had to meet. All in all there were 10 attempts to provide the relevant further particulars and the trial commenced without all the answers having been provided.

[38] Dr Fischer's report was not delivered by 1 June 2016 as promised. On 5 May 2016 it was again pointed out by the land owner defendants that the Claimants had failed to answer questions relating to the identity of the families that had allegedly occupied homesteads on the claimed farms and the exact location of the homes they had allegedly dwelt in prior to their alleged dispossession. An application to compel further particulars was threatened. Dr Fischer's report was not finalised until after the commencement of the inspection in *loco* even though the Third and Fourth Defendants did in fact launch an application to compel further particulars. By 15 June 2016 the Claimants undertook to provide further and better particulars to the questions put by the defendant landowners by Friday, 24 June 2016. After the commencement of the inspection in July 2016 the expert report was still not available, nor were all the further particulars supplied. When particulars were eventually furnished of the various localities at which family kraals had allegedly existed, a number of them differed from the localities pointed out during the inspection in *loco*.

THE INSPECTION *IN LOCO*

[39] The inspection of the claimed land enabled the Claimant Community and the landowners to point out landmarks and other physical features to support their case made out in the pleadings. Physical evidence such as the remains of a building, a homestead or a grave were recorded as indications of earlier occupation.

[40] The inspection was attended by members of the Claimant Community, in particular members of its representative committee, by landowners, the various legal representatives, the Court and a surveyor; who plotted the exact location of every feature that was indicated for later transposition on charts and maps of the claimed land.

[41] The Claimants pointed out numerous localities in cane fields, claiming that homesteads or graves had been there earlier before they had to make way for the extension of agricultural activities. The principal witness, who pointed out more than 70 alleged localities was Mr Albert Mhlongo.

[42] There were a significant number of contradictions between the location of sites identified in the Claimants' further particulars and the physical evidence pointed out during the inspection as having been the places of residence of dispossessed families. A number of alleged former residences were pointed out that had not been identified in the pleadings at all. Some locations that were pointed out fell outside the boundaries of the claim.

[43] The contradictions between the positions of alleged homesteads as identified in the pleadings and the sites pointed out during the inspection were painstakingly tracked and identified by the land owners' legal representatives, whose exceptionally comprehensive heads of argument were of great assistance to the Court. It is not necessary to repeat the diverse contradictions in this judgement, save to record that their very number creates the strong impression that the assertions by the Claimants' witnesses concerning their existence appear to be doubtful, at least. The Claimants and the First and Second Defendants did not at any stage challenge the correctness of the facts recorded in the Third and Fourth Defendants' heads of argument.

THE MAKHOSIKHOSI TRUST

[44] This Trust had been created to control and administer the properties that were transferred to the Claimant Community by way of purchase once the claim had been filed, as set out above. The first trustees included Mr Philip Gumede, who was a witness for the Claimant Community.

[45] It emerged soon after the commencement of the hearing that the Trust and its trustees were embroiled in a bitter internal strife that was so serious that no election of new trustees could take place once the term of office of the first trustees had expired. The trustees and the Trust were involved in litigation and an interdict had been granted against the former trustees, terminating their powers of administration and freezing the Trust assets, including a Mercedes-Benz motor vehicle that the trustees had acquired from the rental proceeds of leaseback agreements concluded with the former owners of the properties transferred to the Trust.

[46] Because of the Trust being paralysed by the internecine strife a curator *ad litem* was appointed to administer and control its affairs shortly after the hearing of evidence commenced, from which moment he instructed the Claimants' legal representatives.

THE CLAIMANTS' EVIDENCE

[47] The Claimants' first witness was Mr Phillip Gumede. He was one of the original trustees and the leader of one of the factions in his community. The existence of these factions had rendered the Trust and its administration paralytic. Mr Gumede devoted a great deal of time to an analysis of the disputes between his committee and other community factions and certain representatives of the Department of Rural Development and Land Reform.

[48] Mr Gumede was responsible for the completion of the claim form, which, as the landowners pointed out correctly, was restricted to portions of the farms Waterfall and Vaalhoek. These farms he knew well as he was born on one of them, and there is nothing to indicate that at the time the claim form was completed he intended to include other farms in his claim. Although this problem was pertinently raised during the proceedings no answer has been forthcoming from the First and Second Defendants to advance any grounds upon which the other farms that were subjected to the claim were included. Small wonder thus that no evidence was led on a number of the properties that were for years affected by all the detrimental consequences of a claim being gazetted over them.

[49] Mr Gumede could not resist the temptation to use the platform which the witness box extended to him to cement his political position. He was clearly bent on making as much capital as possible out of the fact that he had launched a claim and that he was called as the first witness. At the early stages of the trial the community interest was very high and there was a strong public attendance which Mr Gumede sought to impress. It is not necessary to deal with the niceties of the parochial disputes between the former trustees of the Trust and other community members.

[50] Mr Gumede's evidence was restricted to generalities and fell far short from establishing a *prima facie* case for the Claimant Community. It certainly cannot measure up to the evidence of Dr Whelan, Mr Van Jaarsveld and Mr Schoeman, the experts who were later to testify for the Third and Fourth Defendants.

[51] The principal witness called on behalf of the Claimants was Mr Mhlongo. He was a ripe 90 years old when he testified. He gave a detailed account of his youth and adolescence and emphasized that he had been exposed to the culture, practices and rituals that were performed in his community. He claimed to be fully aware of all traditional ceremonies that would be performed in a rural Zulu community. He was at great pains to highlight his father's role as an induna and the importance which the Chief played in allocating residences and directing tribal life on the claimed land.

[52] Mr Mhlongo had pointed out most of the homesteads on behalf of the Claimant Community that he alleged had existed while he lived on the claimed land. He was one of the eldest members of the community and a repository of many of the traditions, customs and tribal lore. He was called to confirm the evidence that he had provided

during the inspection *in loco* by pointing out localities said to have been the sites of homesteads.

[53] He took to his task with gusto and obvious enjoyment. He described in minute detail which families had resided in what homesteads, how many family members shared each residence, what crops they planted and what husbandry they practised. He swanked in telling yarns of his youth and his fond memories of frequent interactions with members of the fairer sex. His enthusiasm for storytelling was patent and from time to time he would allow himself to get carried away and break into song or demonstrate what dances would be performed at some occasions.

[54] It was soon patently clear that Mr Mhlongo was a Munchhausen-esque figure who would not allow any uncomfortable fact to get between him and a good story. He was a colourful raconteur, but his evidence contained little if any element that could assist the Court in coming to a just conclusion of the issues before it. Sadly he passed on soon after completing his evidence.

[55] The mere suggestion that a 90 year-old, even if he carried his old age well, could remember literally dozens of individual families, their status in life and their activities in minute detail is in itself cause for circumspection in the assessment of such evidence. His evidence lost most of its gloss however when he was confronted with the fact that very many, if not most of the homesteads he had pointed out were not reflected on the aerial photographs which Mr Schoeman produced. He was unable to explain their absence, insisted that his evidence was totally correct and opined that he could not account for the aircraft's failure to capture the various structures that he had described. His evidence is furthermore incompatible with the objectively verifiable facts

regarding the existence of a tribal community being governed by a Chief on land they occupied as rental tenants or labourers. The people and homesteads he described so colourfully lived but in his imagination. His evidence can therefore not be accepted.

THE TITLE DEEDS

[56] As has been set out above the Claimants' case is based upon the assertion that their forebears occupied the claimed land as a community under the leadership of a tribal chief and exercised a historical right of occupation. This allegation forms the bedrock of the claim for restitution of the land.

[57] The Third and Fourth Defendants claim ownership of the land on the basis that it was granted to individual owners by way of an officially recognised grant or transfer during or about the middle of the 19th century by the Volksraad of the Republic of Natalia. These grants or transfers were officially recognised by the British authorities when they annexed what is now KwaZulu-Natal. The transfer of ownership was recorded in the Deeds Office and copies of the official title deeds were discovered by the Third and Fourth Defendants at an early stage of the proceedings.

[58] At several of the numerous pre-trial conferences that were held to prepare for trial the presiding judge raised the issue of the title deeds with the parties, and in particular with the Claimants and the First and Second Defendants. Once the correctness of the information contained in the title deeds was established it would have a significant effect upon the nature of the rights which the Claimants enjoyed and exercised over

the claimed land. The Claimants and the First and Second Defendants failed to provide an issuable response to these questions and the trial hearings commenced without the matter having been cleared up. At this stage the Court issued a directive to the parties to provide an answer to the question whether the claimed land had indeed been registered in private ownership in 1913. The Court demanded an answer to this question from the Claimants and the First and Second Defendants. Senior counsel for the Claimants informed the court that he had instructions not to deal with the information contained in the title deeds nor to provide an answer to the question whether the claimed land had been in private ownership during 1913. The First and Second Defendants, while indicating that the title deeds might be unassailable found themselves between a rock and a hard place, as the Second Defendant, through the Commission, was funding the Claimants and could not be seen to be abandoning their case.

[59] The Court had at earlier stages already warned the Claimants that a refusal to accept the correctness of the title deeds could very well lead to an unnecessary prolonging of the trial proceedings and might be visited with a punitive costs order at the end thereof. This warning was repeated on record to both senior counsel representing the Claimants and the First and Second Defendants. It should be pointed out at this juncture that at no stage were the title deeds or the correctness of the information contained therein challenged by either the Claimants or the First and Second Defendants.

THE EXPERTS

[60] Once the evidence of Mr Mhlongo had been concluded the Court insisted that the experts consulted by the parties be called before any other lay witnesses gave evidence.

[61] The Claimants' expert was Dr Fischer. His report became available only after the hearing had started although it was supposed to have been delivered many months earlier.

[62] Dr Fischer is an anthropologist. Although he was called as an expert he had obviously been recruited with the aim to fulfil the role – albeit unwittingly – of a "hired gun". It was glaringly evident that he had not been advised of all the relevant facts.

[63] Dr Fischer followed an approach in the preparation of his expert report that appeared at first blush already to be questionable and unscientific. He is no historian but ventured into this terrain of expertise without appreciating that the history of the occupation of what is now KwaZulu-Natal by its inhabitants in the 19th century, both black and white, has been extensively researched and well documented. He was unaware of many of the principal sources of this history and of documents that were accessible and should be considered and analysed before forming an opinion on the critical issue he was called upon, namely whether there was scientifically acceptable evidence of a Qwabe presence on the claimed land prior to the arrival of the first white owners.

[64] Dr Fischer allowed himself to be persuaded that the Claimant Community was the most reliable source of information to form his opinion. In order to determine the collective knowledge of this community he instructed two assistants to conduct interviews with about 43 randomly selected members thereof. He did not personally supervise the interviews and allowed them to be conducted at the tribal offices in the presence of individuals who had a vested interest in the outcome of the litigation. There was no objective test applied to establish the manner and fashion in which the interviewees had acquired the knowledge they imparted to the interviewers. Small wonder then that he received a virtually unanimous but totally untested chorus of support for the Claimants' case. By accepting this narrative as proven fact Dr Fischer was lured into a position in which he was unwittingly turned from an expert independent of the parties and disinterested in the outcome of the litigation, aiming only to assist the Court to come to a just and intellectually and professionally justifiable conclusion, into a protagonist espousing the Claimants' cause. The result of Dr Fischer's efforts became a parroting of the views that were popularly held by the dominant faction of the Claimant Community, without such opinions being based on objectively verifiable and determinable facts.

[65] He did not consider many important historical sources and was unaware of the most significant documents that affected this case, such as the Nkwenkwezi petition to the Governor General to allow the Qwabe tribe to split and to grant permission to the Nkwenkwezi section to leave the reserve and become rental tenants on white-owned farms in 1898. He misinterpreted the relevant maps reflecting the claimed land.

[66] Dr Fischer was fully aware of the fact that the claimed land was registered in the names of the first Boer trekkers and British settlers who settled in the Lower Tugela in

the second half of the 19th century. He was also aware of the fact that title deeds had been granted to the original settlers by the Boer republic authorities which were recognized by the British administrators after the annexation of Natal. In spite of this knowledge he constructed a concept of parallel existence of the forebears of the Claimant Community living together according to common rules under the authority of a chief on the White-owned farms. There was and is no historical source to support that construct. In so doing he allowed himself to be the mouthpiece of the Claimant's committee without critically examining the empirical evidence that clearly established that no such community occupied the farms that had been in individual White possession and ownership for a significant time before the split of the Qwabe tribe.

[67] His lack of experience in the field of history led him to misinterpret two maps he relied upon as proving the presence of Qwabe on the claimed land before the arrival of the trekkers. His mistake was exposed in cross-examination. He misinterpreted the practice of rental occupancy and the fact the Nwenkwezi voluntarily chose to subject themselves to this system together with their chief when the Qwabe tribe split. He misunderstood the important role the Natal Land and Colonization Company played in advancing this source of income for landlords, whether absent or present.

[68] Once he had to concede that the Qwabe tribe split in 1898 and that the Nkwekwezi only arrived as rental tenants on the claimed land after this date the theory of shared occupation of the land by an independent tribe living under a chief according to shared rules side by side with the white owners had to flounder.

[69] Dr Fischer was mauled in cross examination, was made to effectively withdraw every word of his report and could not but concede the correctness of the landowners' expert and lay evidence when it was put to him.

[70] In contradistinction to Dr Fischer the experts called by the Third and Fourth Defendants are leading authorities on KwaZulu-Natal's history. Dr Whelan and Mr Albert van Jaarsveld are historians (and in Dr Whelan's case also an anthropologist) of note with many years of proven research and peer-reviewed publications on the history of KwaZul-Natal and its people to their name. Both concluded that the forebears of the Claimant Community had not occupied the claimed land before the Qwabe tribe split and the Nkwenkwezi arrived as labourers or rental tenants on the white-owned farms. Both experts critically examined the role of the Natal Land and Colonization Company, one of the major landowners that encouraged rental tenants to occupy the farms which they owned against the payment of rental of usually two or three pound sterling per annum per hut. This policy led to an increase of black rental tenants, but no member of this group exercised independent control of any of the land they occupied in that capacity. Indeed, the Nkwenkwezi Chief himself was a rental tenant from the moment he and his followers left the reserve and he had to suffer the humiliation of being evicted because of his failure to pay rent.

[71] There could therefore be no suggestion of the claimed land having been occupied by a community that organised its life according to joint rules under the authority of a chief. The right to occupy the land as rental tenant or as labourer arose in each individual instance from an agreement between each labourer or tenant and the owner, without the tribal authorities fulfilling any function or playing any part in that process.

[72] Both Dr Whelan and Mr Van Jaarsveld are specialists on the very issue the fate of this case turned upon. Both are recognized as leading historians by their peers and are members of historical organisations and societies. Both researched the history of the farms under claim and found no evidence to support the Claimants' case. Mr Van Jaarsveld had completed a substantial body of research by the time the claim was gazetted, which was provided to the Second Defendant as part of the Third Defendant's representations aimed at persuading the Second Defendant to withdraw the proclamation of the claim. He expanded upon this work in preparation for the trial.

[73] The two experts' research included an analysis by Dr Whelan of the transfers of the original farms or subdivided portions thereof together with historical records indicating the number of black rental tenants or labourers on each farm before 1898. All the data collected by these two historians supported the Third and Fourth Defendants' case. Given the fact that Dr Fischer's evidence presents no challenge to the research, reports and conclusions of the Third and Fourth Defendants' experts it is not necessary to deal with the detailed findings made in respect of each and every claimed portion of land discussed in the reports.

[74] Both Dr Whelan and Mr Van Jaarsveld were excellent witnesses who testified in a rational, confident, coherent and persuasive manner which made a favourable impression upon the Court. What cross-examination there was of their evidence tended to underline the scientific reliability of their conclusions rather than detract therefrom. The Court has no hesitation in accepting the reports and evidence of both Dr Whelan and Mr Van Jaarsveld as correct in every single respect.

[75] Mention must be made at this stage of the valuable contribution made by Mr Schoeman who prepared the aerial photographs of the farms under claim and who designed a number of overlays together with a computerised program which enabled the Court and the parties to establish the exact locality of every physical feature on the ground in 1937, 1959 and 2000. The correctness of these photographs was not and could not be challenged and they were of great assistance to separate truth and fact from fiction in order to make a correct assessment of the situation on each farm.

THE ASSESSMENT OF THE CLAIMANTS' CASE IN THE LIGHT OF THE EXPERTS' EVIDENCE

[76] After the experts had concluded their evidence the writing appeared to be on the wall for the Claimant's case. The Court called upon the parties to prepare a written assessment of their view of the relief the Claimants could still claim at that juncture in the light of the significant turn the case had taken.

[77] The Claimants instructed their counsel to inform the court that they persisted in their case set out in their response to the referral of the claim and the particulars of claim filed of record. The First and Second Defendants' senior counsel, Mr Choudree SC, prepared a memorandum which he circulated to all parties and his clients in which he expressed the opinion that the Claimants were likely to lose the case and recommended that the matter be settled. This opinion by an experienced practitioner well versed in matters of this nature should have carried significant weight, particularly in the light of the fact that the main strut of the Claimants' case, the expert evidence of Dr Fischer, had been knocked from under the platform upon which the Claimants'

case was built once Dr Fischer was forced to concede the correctness of every single fact the landowners relied upon in their defence. Counsel's memorandum should furthermore have been taken seriously in the light of the fact that the First and Second Defendants funded the Claimants' litigation.

[78] For some inexplicable reason counsel's recommendation was not accepted. The Court was informed during argument that this matter represented a test case and that similar matters were waiting in the wings for the judgment in this matter to be delivered. It was therefore decided to press on with the matter in spite of the gloomy opinion expressed by the captain of the First and Second Defendants' ship. The case proceeded. It is difficult to resist the temptation of comparing the taxpayer'-funded Claimants' and State organs' indifference to the immense burden that the decision to continue with a bad case of this magnitude would place upon the public purse and upon the landowners' resources, with the probable reaction of a private litigant funding his legal team out of his own pocket to the advice of an eminent silk under similar circumstances.

[79] The Claimants called a number of further witnesses to support their case. None of them were able to challenge the conclusions to which the Third and Fourth Defendants' experts had come – a fact of which senior counsel for the Claimants must have been aware before they were called into the witness box. He was obviously instructed to do so but it was clear that the proceedings were being unnecessarily prolonged, at great cost to the Third and Fourth Defendants, who had to carry their own costs; and to the taxpayer who had to fund the Claimants and the First and Second Defendants.

THE CLAIMANTS' FURTHER WITNESSES

[80] Mr Lethukthula Mkheswa Gumede testified in respect of the alleged occupation by the tribal community of the farm Compensation. He had given a prior statement to Dr Fischer which was annexed to Dr Fischer's report. He did not make a good impression in the witness box, contradicted his previous statement and generally appeared to be vague and uncertain, referring to localities that were outside of the claimed area. The two stops at which he pointed out the existence of alleged homesteads did not appear on either the 1937 or the 1959 aerial photographs, which put paid to his credibility in this respect.

[81] Mr Albert Maxwell Mpunzana sought to create the impression that he was born in an area that was not occupied and owned by a white farmer and his family, while it emerged in cross-examination that he was in fact born on the farm Driefontein. His evidence that his family was evicted during his lifetime from their traditional residence was belied by the 1937 aerial photograph which clearly showed the presence of the Clayton residence at the time of his birth on that farm. He too, deviated from his statements to Mr Fischer in respect of alleged evictions from the farm Compensation and could not dispute that the spots he pointed out as earlier homesteads had already been covered by sugar cane in 1937.

He was uncomfortable on the witness stand and his evidence could certainly not gainsay that of the Third and Fourth Defendants' experts.

[82] Mr Timothy Ncube made a bad impression. He alleged in his witness statement to Dr Fischer that his family had been evicted in a terrible fashion from their dwellings

on Mr Clayton's farm. In cross-examination he confirmed that his father had been dismissed from Mr Clayton's service but was quite obviously attempting to mislead the Court when he denied that he was aware of the reason for such dismissal. His father had been accused of poisoning Mr Clayton's cattle.

He was not descended from any dispossessed person, in fact his family did not live on the claimed land. His evidence therefore lends no support to the narrative the Claimants would wish the Court to accept.

[83] Ms Nomusa Isabella Nxumalo took the witness stand with the clear intent to lead the Court up the garden path. She recited the narrative of the Claimant's committee that she was born into a tribal community, but it soon emerged, even before cross-examination, that she was born on a farm owned by Mr R E Goble. She pointed out a variety of alleged traditional dwellings during the inspection, of which most did not appear on the 1937 or 1959 aerial photographs, when the localities she identified were already under sugarcane.

What was noticeable during her evidence was her tendency to look to the back of the court room at the members of the Claimant's committee, notably Mr Phillip Gumede, in the public gallery whenever she was confronted with a difficult question. Several other witnesses acted in similar fashion, which casts serious doubts on the veracity of their narrative.

[84] Thandakwakhe Simamane was alleged in Dr Fischer's report to have witnessed evictions from the farm Vaalhoek. No such evidence was given when he was called to the witness stand. He had pointed out two alleged former traditional dwellings, which did not however appear on the aerial photographs of 1937 or 1959.

[85] Balungile Albertina Mpanza was born on Mvuma where her father worked. Contrary to what was alleged in the pleadings her father was requested to move to a different accommodation by his employer for operational reasons but was not dispossessed. A similar contradiction occurred in respect of Mr Ngubane who lived on the same farm and was allegedly, according to the Claimants' further particulars chased off the farm. The witness testified that he left voluntarily after he fell ill and was never seen again.

Her statement to Dr Fischer's assistants that she was born into a traditional community ruled by a tribal chief was not repeated in evidence. She was unable to explain the stark contradiction between her evidence and the statement.

No dispossession was established through her evidence.

[86] Bhekokwakhe Johan Hlongwa gave two conflicting statements which he contradicted in evidence. His pointing out was also unreliable. He could not advance the case of the Claimants.

[87] Bhekizwe Mavundla was another witness whose statement to Dr Fischer's assistants differed markedly from his evidence. While he sought to support the Claimant narrative it soon emerged that he was never resident on any of the claimed land and knew very little about any dispossessions.

His pointing out of several spots differed from the allegations in the further particulars. His evidence can therefore not be relied upon.

[88] Ms Ngaleleni Luthuli gave evidence that tended to support the case of the landowners. On the farm Spizkop she did not witness random evictions but confirmed that rent payers occupied the farm which was owned and controlled by a white farmer. She confirmed that chief Sizibeni paid rent as well.

[89] Ms Rosalinah Mhlongo testified that she lived in a compound provided by Mr Collins, the owner of Kruisfontein. Her grandfather, who was allegedly dispossessed, was according to her allowed the choice to stay or leave. The allegations in the pleadings and further particulars of a forced removal of her grandfather and other occupants remained unsubstantiated

[90] Mr Bafu Bantu Stanley Ngiba took an active part during the inspection in *loco* pointing out several spots at which homesteads had allegedly stood prior to their owners being dispossessed. A number of these localities had not been identified in the Claimants further particulars.

Apart from this fact Mr Ngiba was observed during the inspection 'repeatedly consulting a list he carried with him from locality to locality. When he was confronted with this fact in cross-examination he denied any knowledge of it. During the inspection photographs were taken of every locality that had been identified as one where a homestead was said to have stood in the past. On one of these photographs the witness appeared, clearly holding a list in his hand. (Another witness, Mr Cedric Gumede, was similarly observed consulting an exercise book during the inspection.) The matter was formally taken up with the Claimants' attorneys who claimed privilege for these notes but did not deny their existence. The witness however explained that

the list might just have been a piece of paper that he had picked up during the inspection.

Quite apart from this obvious untruth the witness' action cast a very serious light upon the reliability and veracity of the Claimants 'evidence.

A number of the spots pointed out by Mr Ngiba were shown by Mr Schoeman's aerial photographs to be non-existent as they fell in an area that was covered by sugarcane in 1937 already. Apart from the fact that the witness was shown to be unreliable in this respect, he testified that the employees of Mr Collins left his farm after he passed away. He confirmed in cross-examination that Mr Collins had followed the practice to demand that a person who resigned from his employment or retired leave the farm.

[91] At the end of the Claimants' case it was obvious that neither the expert nor the lay evidence led on their behalf established any dispossession, let alone a dispossession based upon the array of racial and repressive laws that were listed in the referral report. The allegation that a community as defined in the Act had exercised control over the claimed land under the direction of a chief and lived according to shared rules was demonstrated to have no foundation in fact at all. Every single averment regarding the history of the land in question which was made in the representations to the Second Defendant by the Third Defendant based upon Mr Van Jaarsveld's professional report had been proven correct through the Claimants own evidence, either in chief or in cross-examination.

THE LANDOWNERS' EVIDENCE

[92] Two members of the Third Defendant were called to the witness stand, Mr Neil Patrick Hulett and Mr Arthur Kenneth Guy Goble. Both are direct descendants in the third or fourth generation of original owners of some of the farms under claim. Both testified about their proud family history of developing the various farms, establishing the sugar industry and other agricultural activities such as tea plantations and animal husbandry. Both referred to documents such as diaries, trade records, letters, family histories and memoranda which demonstrated their respective families' extensive and continued contribution to the South African economy in general and the agricultural and sugar industries in particular.

[93] From the evidence and the documentary proof which supported their account of their respective families' history, occupation and management of the farms under claim it was incontrovertibly clear that no community had occupied the claimed land before it was acquired by the first farmers.

[94] Mr Goble provided an extensive account of not only his family history, but also the various acquisitions and transfers of the subdivisions of the various family farms, some of which were under claim. His forebears had kept minute accounts of their trading transactions and agricultural activities which the family has preserved and which demonstrated that the memorandum presented to the Second Defendant by Mr Van Jaarsveld many years before the matter was finalised, was true and correct in every respect.

[95] Neither Mr Hulett nor Mr Goble was cross-examined on behalf of the Claimants, senior counsel for the Claimants asking no more than a few perfunctory questions that did not challenge any single one of the factual assertions made by the two landowner witnesses. This fact may be described as the defining characteristic of this entire case: after more than 20 years of having their properties subjected to the restrictions of a restoration claim, having their factual representations in opposition thereto ignored by officialdom, being dragged to court in spite of the records in the Deeds Office; being forced to spend millions in the defence of their properties against an entirely un-meritorious case, being forced to continue with the matter after the Claimants' expert evidence had been demolished and senior counsel had advised the First and Second Defendants that the claim had no chance of success – after all these challenges, frustrations and unnecessary expenditure of vast sums of money, the truth of their evidence under oath was conceded. Their evidence was not only left unchallenged in cross-examination, but during argument at the end of the trial senior counsel for the Claimants placed on record that he was not "going to argue against the inevitable." Viewed against this background this entire trial can only be described as a grave abuse of the process.

[96] It goes without saying that the landowners' evidence is accepted as correct.

THE FIRST AND SECOND DEFENDANTS' WITNESSES

[97] The First and Second Defendants called the author of the investigation report to the witness stand. He was responsible for the recommendation that the claim be pursued. He opined in his report that the Claimant Community or their forebears had enjoyed indigenous ownership rights to the claimed land. That this finding was

untenable emerges with striking clarity from what has been stated above. Little wonder then that Mr Zuma found it very difficult to justify his conclusions.

[98] The legal officer responsible for the validation report, which report was prepared to justify the acceptance of the original claim, was Mr P E Duma. He could not explain why farms that had not been mentioned in the original claim form were subjected to the claim. He also cut a sorry figure on the witness stand.

[99] Mr Z Nkosi was responsible for the administration of the claim and administrative support to counsel for the Commission and the Court. Suffice to say that his services were less than effective. He experienced considerable difficulties in explaining why, after the Third Defendant had made its memorandum available to the Second Defendant and the Commission, and the second defendant had decided to provisionally withdraw the claim, it was nonetheless decided to proceed with the matter in the teeth of the incontrovertible facts disclosed in that memorandum. He sought to hide behind the Commissioner, blaming him for the final decision to proceed. He felt visibly uncomfortable while testifying. The Commissioner was not called. The Court can only conclude that he would not have been able to justify his decision.

INTERESTED PARTIES

[100] During the proceedings two interested parties sought to participate in pursuit of claims of their own, but their provisional admission to the proceedings eventually came to nought. Several families whose properties were covered by the claim but who had never been served with any notice thereof and had not been joined as parties were

permitted to participate to a limited extent, but it is not necessary to deal with their interests in the light of this Court's judgement.

COSTS

[101] It has been stated above already that the pursuit of the relief claimed on behalf of the Qwabe/Waterfall community amounts to a gross abuse of the Restitution of Land Rights process as directed by the Act. To highlight some of the worst excesses in motivation of a punitive costs order the following has to be listed:

101.1 The authority of the alleged representative of the Claimant Community to lodge the claim was never investigated;

101.2 The claim was accepted in respect of a large number of immovable properties that had not been identified in the claim form and, as it turned out, no evidence was led in respect of a considerable percentage of these farms at any stage of the proceedings;

101.3 There is no evidence that the comprehensive memorandum prepared by the Third Defendant in opposition to the gazetted claim was properly considered and analysed by the Second Defendant;

101.4 The decision not to withdraw the section 11 A notice and to proceed with the claim was taken on the flimsiest of allegations. If the further particulars are to be believed that were filed in answer to the Third Defendant's request, the bare allegation that the Claimant Community had been deprived of 12,000 ha was sufficient to subject the landowners

to all the vicissitudes of a claim of this nature. If this is true the Second Defendant did not interrogate the Claimant Community's allegations and did not exercise his mind properly when taking a decision that gravely affected the rights of a large number of productive farmers. Their rights were simply ignored which points to a clear dereliction of duty on the part of the Second Defendant;

101.5 The title deeds of the land that was subjected to the claim were readily available at all relevant times, even before the claim was validated or gazetted. As has been set out above they reflect private ownership of the land concerned from about the middle of the 19th century, which must have cast serious doubt upon the sustainability of a restitution claim based on the occupation of the land by a community. There is no suggestion that the title deeds were considered before it was decided to press ahead with the claim;

101.6 During the preparation of the trial at pre-trial conferences, and again after the trial had started the Court pertinently raised this issue and demanded that the parties consider the content of the title deeds and the effect thereof on the claim. The Claimant Community flatly refused to deal with this considerable obstacle in the path of their case and instructed counsel to press ahead regardless. At no stage did the First and Second Defendants, who were represented by senior and junior counsel at all stages of the proceedings, intervene to prevent the claim from being pursued in the teeth of a very considerable, if not insurmountable obstacle;

101.7 The expert reports prepared on behalf of the Third and Fourth Defendants were available at an early stage prior to the commencement of the hearing. At no stage was there, if the conduct of the trial on behalf of the Claimant Community is considered, seemingly any engagement with the contents thereof and no second thoughts appear to have been given to the merits of the Claimant's case in the light of the significant challenge they presented;

101.8 The Court demanded that the expert witnesses be interposed after the evidence of Mr Mhlongo. As soon as these witnesses had testified it must have been crystal clear to any objective observer that the Claimant Community had no realistic chance of proving a dispossession, let alone the dispossession of an entire community living according to shared rules under the guidance of a chief. Indeed, senior counsel for the First and Second Defendants advised them in writing that their case was probably lost. The decision to continue with the pursuit of the claim and to call witnesses who the Claimants' legal advisers must have known would be unable to shake the foundations of the landowners' expert evidence was nothing short of vexatious. Such conduct merits a punitive costs award;

101.9 The cracks were showing in the Claimant's case at a very early stage. The consistent inability to pinpoint the homesteads from which the alleged Claimant Community was allegedly dispossessed, the addition of a number of previously unidentified alleged residences during the

inspection in *loco*; the fact that one of the principal witnesses was carrying a list admittedly not prepared by himself which appeared to contain the names and physical indications of what turned out to be non-existent homesteads suggested that a claim was being concocted. The palpably incorrect evidence given by the principal witness for the Claimant Community, Mr Mhlongo, which could not measure up to the objective narrative of the aerial photographs; the tendency of particularly the later witnesses to seek guidance from members of the Claimant committee while on the witness stand – all suggest that the Claimant committee knowingly embarked on a claim that was being pursued for selfish gain and not for the redress of past injustice;

101.10 The repetitive unreadiness of the Claimants to proceed with the trial caused significant delays. Had it not been for the willingness of the landowners and their legal representatives to ensure that properly prepared, paginated and indexed files where available, that the proceedings at the inspection in *loco* were correctly recorded and to provide a recording of the evidence by their private machines after the court's official recording device failed the trial might have lasted even longer than it did.

[102] Bearing the above circumstances in mind a punitive costs order is justified, see: *Hlaneki and Others v Commission on Restitution of Land Rights and Others* [2006] 1 All SA 633 LCC; *Elambini Community and Others v Minister of Rural Development and Others* [2018] ZALCC 11. Vexatious litigation, even if not actuated by malice but caused by negligence, indifference and incompetence justifies a punitive costs order:

Lawyers for Human Rights v Minister in the Presidency and Others 2017 (1) SA 648 (CC); *Limpopo Legal Solutions v Eskom Holdings SOC Ltd* [2017] ZACC 34 and the authorities cited in these judgments. Applying the principle established in *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6)232 (CC) that in constitutional litigation – which includes a restoration claim – individuals unsuccessfully pursuing constitutional relief against the State should not be mulcted in costs, the punitive costs order will issue against the First and Second Defendants only.

A WORD OF APPRECIATION

The Court is indebted to the legal representatives of the Third and Fourth Defendants, Mr G Grobler SC, Mr H Havenga SC and Mr Clive Kelly for their willingness to shoulder many administrative tasks which they would ordinarily not have been expected to perform. Without their readiness to prepare bundles, share their recordings, assist the court in reconstructing evidence that was not captured by the Courts recording device and to assist their colleagues acting on behalf of the Claimant's and the First and Second Defendants whenever the latter's resources were strained the trial proceedings would have been even more prolonged than they were.

The court is further indebted to them for their extraordinarily comprehensive and lucid heads of argument, which have been of great assistance to us.

THE ORDER:

1. The Claimants' claim is dismissed;

2. The First and Second Defendants are ordered to pay the costs incurred by the Third and Fourth Defendants (hereinafter called 'the Defendants') on the scale of attorney and client and are to include:

2.1.1: The costs of the Third and Fourth Defendants' contempt application of 28 September 2012, including all attendances thereupon, the consultations to prepare the drawing of affidavits and any other necessary pleadings, including the telephonic conference held on 13 May 2013 referred to in the order of 9 July 2013;

2.1.2 The cost of the second contempt application and the costs incurred by the postponement thereof on 27 November 2014, included by order of court in the costs in the referral;

2.1.3 The employment of two counsel and an attorney in respect of all trial dates;

2.1.4 The costs reserved on 1 February 2012 in respect of the application to compel the delivery of further particulars;

2.1.5 The costs of two counsel and an attorney and the Randburg correspondent where applicable, for attending all pre-trial conferences in the preparation and circulation of the agenda and minutes thereof, the costs incurred in respect of consultations with representatives of the defendants, and the costs in respect of consultations with the experts listed below and the witnesses who testified, including all travelling and accommodation

expenses and costs in respect of travelling time, as determined by the taxing master;

2.1.6 The costs of attending to inspections in loco by two counsel and an attorney and one expert witness, Mr Van Jaarsveld, including costs in respect of travelling time and travelling expenses to be determined by the taxing master;

2.1.7 The travelling and reasonable and necessary accommodation expenses of the witnesses and expert witnesses of the defendants to attend the trial of the matter;

2.1.8 The qualifying fees and expenses of the expert witnesses Dr Whelan, Mr Van Jaarsveld and Mr Schoeman, such costs to include the costs of visiting the various archives, copying of discovered documents, the inspections in *loco* conducted by them, the consultations by them with the defendants to obtain relevant information and documentation to compile their reports; the drafting of the report and the consultation time with the defendants' two counsel and attorney, and the attendance fees for the trial;

2.1.9 All costs of preparing maps and the obtaining of all aerial photographs, the preparation of all electronic files and the making of copies thereof for the trial;

2.1.10 All costs incurred by the defendants' attorney and correspondence attorney in Randburg in preparation, collating, copying, indexing and pagination of all bundles of documents, including files numbered 1 to 15 F; the exhibit files, maps and photographs, transcripts of court proceedings and making copies thereof as well as indexing and pagination of the Court bundles and files (inclusive of lever arch files), (the letter costs and expenses of which were the responsibility of the plaintiff's attorneys).

E Bertelsmann

Judge, Land Claims Court

I agree

E Sibeko

Assessor

Appearances:

For the Claimants/Plaintiffs:	Adv. I Topping SC
	Adv. D Naidoo
Instructed by:	Gumede & Jona Inc. Attorneys, Durban
For the 1st and 2nd Defendants:	Adv. R Choudree SC
	Adv. C Nqala
Instructed by:	The State Attorney, Durban
For the 3rd and 4th Defendants:	Adv. G Grobler SC
	Adv. H Havenga SC
Instructed by:	Truter James De Ridder Attorneys, Empangeni